85-679

Supreme Court, U.S.
FILED
OCT 19 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO: _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WALTER W. WENDOLKOWSKI, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

* * * * * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Whether the United States District Judge erred in not granting a mistrial on the grounds of juror misconduct when his investigation of an alleged incident of juror misconduct involving out-or-court remakrs by a juror to other jurors and alternates expressing an opinion of the guilt of the defendants revealed additional incidents of juror misconduct in the jury room apparently witnessed by a number of jurors and alternates, and whether the failure of the Judge to fully investigate the other incidents of juror misconduct involving similar statements and also the use of a calculator in the jury room in the presence of a number of the jurors and alternates constitutes reversible error.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are the

defendant/appellants in companion appeals that were consolidated for briefing and argument in the Court of Appeals for the First Circuit; they were all convicted by the same jury in the same trial, in U.S.A. v. Michael Abell, et al. U.S. District Court for the District of Maine. Case # Criminal 82-00018B to wit: (The numbers after each name are the appeal numbers for the Court of Appeals) Anthony Anello, No. 84-1406; Daniel Duval, No. 84-1407; James Michael Oliver, No. 84-1408; David Root, No. 84-1409; John Sachs, No. 1410; Fred R. Verderame, No. 84-1411; Walter Wendolkowski, the petitioner, No. 84-1412, and Gervasio Guillen, a/k/a Jorge Ortiz-Germasio, No. 84-1452. The United States is also interested as the prosecuting authority, through Richard S. Cohen, Esq., U.S. Attorney, and Jay P. McCloskey, Esq. AUSA.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit was entered on June 20, 1985; a pertinent extract from that opinion is printed in Appendix A hereto, infra, page A-1, et seq.

The Ruling on Motion for Rehearing in the United States Court of Appeals for the First Circuit entered on August 21, 1985, is printed in Appendix A hereto, infra, page A-6b.

The Ruling on Motion for Mistrial on Grounds of Juror Misconduct entered in the United States District Court for the District of Maine, in the case of United States of America v. Michael Abell et al. Case No. Criminal 82-00018-B, is printed in Appendix A hereto, infra, page A-7 , et seq. The Memorandum Supplementing Findings on Motions for Mistrial entered in the same case on the 12th day of March, 1984 (the same date as the Ruling), is printed in Appendix A hereto, infra at page A-21, et seq.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, by affirming the judgment of the United States District Court, approved the procedure followed by the district judge in making an investigation into the allegations of multiple incidents of juror misconduct. The Court of Appeals said, "Here, the district judge investigated the matter promptly and thoroughly." (Appendix A, p.A-3). Also, "defendants received the trial by an unbiased jury to which the Constitution entitles them." (Appendix A, p.A-6). The Appeals Court also found and concluded that the district judge did not abuse his discretion in determining the nature and extent of his inquiry into the allegations of juror bias. (Appendix A, p.A-5).

Two First Circuit cases provide guidelines for investigations into allegations of juror misconduct, namely, United States v.

Richman, 600 F2d 256 (1st Cir.1979); and United States v. Doe, 513 F2d 709, (1st Cir. 1975). Those cases require that the trial court make a full investigation to ascertain whether the alleged jury misconduct actually occurred.

In this case the trial court's in camera inquiry revealed that apparently there were incidents of juror misconduct that has occurred in addition to the one originally reported, one of which was extrinsic in nature and, in fact, more serious than the misconduct that the court initially set out to explore. This last incident involved an alternate juror's bringing into the jury room a calculator prior to the close of the case and utilizing it in the presence of those who would be responsible for determining the guilt or innocence of the defendants. See, e.g. United States v. Chiantese

582 F2d 974 (5th Cir.1978) (a presumption of prejudice arises when an outside influence on the jury is brought to the attention of the trial court).

The trial court became aware of the calculator incident in questioning regular juror #3 who had seen alternate #3 using the instrument. The court dismissed both of them but did not ask the other jurors and alternates about the occurrence. This despite the fact that juror #3 said that it took place in the jury room apparently in the presence of other members of the jury. (T.2271-2272)*

The Court also heard from alternate juror #4, Brenda Dickey, that the same alternate juror #3 said something in the jury room about the guilt of the defendants following

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*References herein to the trial transcript will be: T. followed by page number(s).

lunch recess that day, after the jurors had returned. (T.2253). This should have alerted the Judge to the very real possibility, if not probability, that other jurors and alternates had overhead such remarks and had witnessed the calculator incident.

The Judge's failure to ask the other jurors and alternates about the additional incidents of juror misconduct was, we maintain, an abuse of his discretion and, by approving what he did, the Court of Appeals committed error. This, we feel, is a departure by the trial court from the accepted and usual course of judicial proceedings which has been sanctioned by the Court of Appeals requiring an exercise of the Supreme Court's power of supervision.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered and its opinion rendered on June 20, 1985; an extract of the opinion pertinent to questions raised in this petition is found in Appendix A, page A-1, et seq. A timely petition for rehearing filed on behalf of Gervasio Guillen was denied on August 21, 1985; the order denying that petition is found in Appendix A, page A-6b. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution, which reads, in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State

> and district wherein the crime shall have been commited, ... (and) to be confronted with the witnesses against him; ...

is referred to in the opinion of the Court of Appeals Appendix A, p. A-6 .

STATEMENT OF THE CASE

Petitioner and others were tried and convicted in United States District Court, District of Maine, at Bangor, commencing on February 21, 1984 of conspiracy to violate certain marijuana laws of the United States.

The trial proceeded more or less routinely until midday on the last day of the third week of the trial when an incident of apparent "juror misconduct" was reported to the Court. All defendants, including petitioner joined in a motion for mistrial. The Court took testimony of petitioner and another defendant who allegedly had witnessed the incident and heard statements of defense attorneys who also had been present. The Court then interrogated the jurors and alternate jurors individually, in camera.

The incident in question was reported to have taken place in the elevator lobby on the

third floor of the courthouse, where the courtroom was located, during the noon recess; the alleged misconduct centered upon a remark by a juror or alternate in the presence of other jurors and/or alternates to the effect that "all of the defendants are guilty anyway."

The phase of the trial relating to the reporting of the incident, the making of the motion for mistrial, and the inquiry made by the Judge is found at T. 2207-2346.

The in camera interrogation of the jurors and alternates not only confirmed that the reported incident in the vicinity of the elevator had occurred "substantially as alleged", but also revealed other instances of juror misconduct which had taken place during the course of the trial.

Additionally, the trial Judge concluded:

"5. The instances of juror misconduct, involving alternates #1,3,4 and 6

> and, possibly regular #3 cannot be found to have been 'clearly unprejudicial..." (Appendix A, page A-18).

Following the in camera inquiry, the Court dismissed from further service at the trial regular juror #3 and alternates #1,3,4 and 6. (Appendix A, page A-19).

The incident that led to the inquiry in question, and the additional incidents of juror misconduct revealed in the course of questioning were contrary to the Court's oft-repeated standard admonishments to the jury not to discuss the case, to keep open minds and form no opinions until such time as the jury might be directed to retire to deliberate on their verdicts.

Alternate #4 told the Judge that upon return from lunch the very day of the original reported incident, alternate #3 "may have said something" to the effect that "most of them were guilty." (Appendix A, p.A-11). This, she added, was while

other jurors were present. Alternate #4 characterized the statement as "kidding around", which was, of course, merely her subjective appraisal of the remark. Alternate #4 also recalled alternate #1 saying that he was tired and "could be bought."

Alternate #1 told the Judge that he and alternate #6 used the stairs during the noon recess, rather than the elevator, on the way out of the building for lunch on the day in question. He admitted that he might have said to alternate #6 that he believed that most of the defendants were guilty, and further stated that in his opinion alternate #6 entertained the same belief. Alternate #1 was asked by the Judge: "And with any other Juror, have you discussed your opinion?" To which alternate #1 replied, "I might have. I don't know."

Alternate #1's statement that he "might have" discussed his views with others on the

panel is ignored in the Judge's ruling. (Appendix A, pages A-7 through A-20). Also, it does not appear that the "might have" statement was pursued by the Judge with any of the other jurors or alternates.

Regular juror #8 was asked by the Judge: "Is it your impression that any of your fellow jurors has come to a final conclusion?" To this she replied: "They've been talking, but I don't---I think maybe some of them have made up their minds." The Judge did not examine further into the intelligence revealed in that answer, either.

With respect to jurors ##1,2,4,5,6,7,9, 10,11 and 12, the Judge's questions on the subject under inquiry seem to have been limited to the noon recess on the day in question and in a very general way. Actually with respect to this last group mentioned and alternates ##2 and 5, the examination was

cursory at best.

Another example of the insufficiency of the inquiry made in camera to the jurors and alternates involves the questions posed to alternate #4, Brenda Dickey and alternate #3, Reva Merrill. The latter was interrogated first, commencing at T.2244. At T.2245, the Judge asked Ms. Merrill whether after she had returned from lunch she had any discussions in the jury room relating to the guilt or innocence of any of the defendants. That question was not answered because juror #3 interrupted the Judge's train of though and he did not pursue it. Next the Judge examined alternate #4, Ms. Dickey, (T.2253) and asked her a similar question, and she replied that she thought that alternate #3 might have said something in the jury room after they returned from lunch. Perhaps the Judge should have recalled alternate #3 to explore the possibility that she had made such a statement in the confines

of the rather small jury room with other jurors present, but he did not.

The Judge's omission in this regard was compounded by the extremely cursory examinations of the majority of the panel as previously noted.

Among the additional incidents of juror misconduct that surfaced during the questioning was, as has been stated above, the introductions of and use of a calculator in the jury room by alternate juror #3. Judge Cyr made a passing reference to the calculator in his ruling (A-12) but the question looms large: did the Judge give that incident the attention that it deserved? We say "No!".

The calculator lady was the same person who was found to have said "all of them are guilty anyway," alternate #3. The Judge found that she had said that out by the elevator as reported, but it would appear that she

repeated the statement in the presence of the others in the confined atmosphere of the "rather small" jury room the same day.(T.2271).

In his questioning of alternate #4, the Judge elicited that in the jury room the statement was made to the effect that "most of them, something about being guilty".(T.2253 and A-11)

Returning to the calculator incident as it bears upon the question of juror misconduct, it is to be noted that the Judge avoided the subject in his questioning the regular and alternate jurors. He neglected to ask any juror or alternate whether he or she had witnessed the incident, or if witnessed, what remarks, if any, had been made by the lady with the calculator. The Court did not attribute any importance to that extrinsic influence... none at all. He did not even recall the perpetrator to inquire into the circumstances of the incident, who was present, what was said,

who heard her or could have and what discussion, if any, had ensued.

The trial judge denied the motion for mistrial, and the Court of Appeals upheld his ruling on that question.

Note: The jurisdiction of the United States Court of Appeals for the First Circuit to review the judgment of the United States District Court for the District of Maine was invoked under 28 U.S.C. 1291 and Rule 4(b) of the Federal Rules of Appellate Procedure.

ARGUMENT

Petitioner adopts as his argument amplifying the reasons for granting the writ, the argument made by counsel for codefendant/ appellant, Gervasio Guillen, in his Petition for Rehearing in the Court of Appeals, Case No. 84-1452, in that part of said petition extracted in Appendix B hereto, infra, p.B-1, et seq. q.v.

By way of summing up, the record reflects multiple incidents of juror misconduct, and although the Court made a lengthy inquiry into the situation, it is submitted that the inquiry fell far short of what was necessary under the circumstances. The trial court failed to follow up on important leads supplied by individual jurors and alternates during the in camera inquiry. The trial court ignored the calculator incident. Also, and most importantly, the trial court disregarded the clear rulings in Doe and Richman, supra, that a mistrial is called for

when the court finds that the incident as alleged actually occurred and that it was not clearly unprejudicial.

CONCLUSION

It is respectfully suggested that the ruling of the United States Court of Appeals for the First Circuit expressed in its opinion of June 20, 1985, is in error with respect to the Juror Misconduct question and should be reversed with instructions to remand the case to the United States District Court for the District of Maine for a new trial.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1412

UNITED STATES OF AMERICA,
Appellee

v.

WALTER WENDOLKOWSKI
Defendant,Appellant

JUDGMENT

Entered June 20,1985

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was arged by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Francis P. Scigliano
Clerk

[cc: Messrs. McCloskey, Goltzer, Booth, Loewy, and Ms. Wilmore]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1406

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY ANELLO,

Defendant, Appellant.

No. 84-1407

UNITED STATES OF AMERICA,

Appellee,

v.

DANIEL DUVAL,

Defendant, Appellant.

No. 84-1408

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES MICHAEL OLIVER,

Defendant, Appellant.

No. 84-1409

UNITED STATES OF AMERICA,

Appellee,

v.

DAVID ROOT,

Defendant, Appellant.

No. 84-1410

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN SACHS,

Defendant, Appellant.

No. 84-1411

UNITED STATES OF AMERICA,

Appellee,

v.

FRED R. VERDERAME,

Defendant, Appellant.

No. 84-1412

UNITED STATES OF AMERICA,

Appellee,

v.

WALTER WENDOLKOWSKI,

Defendant, Appellant.

No. 84-1452

UNITED STATES OF AMERICA,

Appellee,

v.

GERVASIO GUILLEN a/k/a JORGE ORTIZ-GERMASIO,

Defendant, Appellant.

APPEALS FROM
THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MAINE
(Hon. Conrad K. Cyr, U.S. District Judge)

Before

Breyer and Torruella, Circuit Judges,

and Pettine,* Senior District Judge.

Richard R. Booth on brief for Walter Wendolkowski. Lillian A. Wilmore with whom James W. Lawson, Oteri, Weinberg & Lawson, Marshall A. Stern, and Stern and Goldsmith were on brief for David Root. George G. Goltzer with whom Goltzer & Adler was on brief for John Sachs. Ira N. Loewy with whom Edward R. Shohat and Bierman, Sonnett, Shohat & Sale P.A. were on brief for Gervasio Guillen. Arthur E. Huttoe on brief for Anthony Anello, Daniel Duval and Fred Verderame.

Jay P. McCloskey, Assistant United States Attorney, with whom Richard S. Cohen, United States Attorney, was on brief for appellee.

June 20, 1985

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*Of the District of Rhode Island, sitting by designation.

[Point 1. is omitted as not being relevant]

2. Juror Misconduct

All eight appellants complain of the manner in which the district court handled two instances of alleged juror misconduct. The first consisted of a remark made by one juror to another just after the prosecution concluded in its closing argument, to the effect that "they're all guilty anyway." Defense counsel, overhearing the remark, brought it to the attention of the court, which then individually questioned each juror about it under oath in camera. The judge concluded that alternate juror #3 made the remark in the presence of regular juror #3, alternate #4, and possibly also alternates #1 and #6. He dismissed these jurors, but he denied a mistrial, finding

> there is no indication of any juror misconduct on the part of any of these jurors; there

> is no indication that anything was said by or within the hearing of any of those jurors about the innocence or guilt of any defendant; . . . (t)he alleged jurors misconduct has not reached, tainted, or affected (the other jurors and alternates) in any way; nor is there any otner indication that any of these jurors is other than willing and able, indeed determined, to maintain an open, unbiased, impartial and fair mind in determining the innocence or guilt of each and every defendant.

Appellants claim that, since the misconduct may have prejudiced some jurors, the court had to grant their motion for a mistrial. We do not agree. Here, the district judge investigated the matter promptly and thoroughly. He made specific factual findings. He dismissed the jurors who might have been prejudiced. See United States v. Richman, 600 F.2d 286, 295-96 (1st Cir.1979) (declining to require mistrial where district court dismissed only juror possibly tainted by misconduct); United States v. Corbin, 590 F.2d 398, 400-01 (1st Cir.1979)(same), cert.

denied, 104 S.Ct. 1425 (1984). The court's conclusion that the remaining jurors were not prejudiced and that they would maintain "an open, unbiased, impartial, and fair mind in determining the innocence or guilt of each and every defendant" is a reasonable conclusion to draw on the basis of the record. That being so, there is no legal reason for requiring a new trial. Defendants received the trial by an unbiased jury to which the Constitution entitles them.

Second, during the course of the in camera questioning the court became aware that alternate juror #3 had seen regular juror #3 using a calculator, apparently to determine how much money defendants might make from their drug transactions. The court dismissed both jurors, but it did not ask the other jurors about the incident. Appellants, citing Richman, supra, and United States v. Doe, 513 F.2d 709

(1st Cir.1975), claim that the court ought to have investigated the matter further.

Our 'jury misconduct' cases, however, while requiring the trial court to "conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred," Doe, 513 F.2d at 711-12, also recognize

> the 'discretion (of the trial court) to determine the extent and type of investigation requisite to a ruling on the motion (for mistrial.)'

Id. at 712 (quoting United States v. Tillman, 406 F.2d 930, 938 (5th Cir.1969)). We have noted that the "district court has broad, though not unlimited, discretion to determine the extent and nature of its inquiry into allegations of juror bias". Corbin, 590 F.2d at 400. We find no abuse of that legal power here.

For one thing, the district judge conducted a sufficiently thorough investigation to determine whether the alleged episode of misconduct -- the use of the

calculator -- in fact occurred; and, he dismissed the two jurors involved. Further, the court had no clear indication that any other jurors had seen the incident. No one else mentioned it. All of the others specifically denied they had heard any improper discussions in the jury room. And all the others swore they could remain open minded. The trial court might reasonably have concluded that to question these other jurors more specifically about the incident -- in the absence of good reason to believe they had witnessed it -- might, by drawing their attention to it, "do more harm than good," id., at 401.

(See p.A- 6b)

Thus, here too, we conclude that all the appellants received the trial by an unbiased, impartial jury to which the Constitution's Sixth Amendment entitles them.

(End of Extract from Opinion)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1452

UNITED STATES OF AMERICA,
Appellee,

v.

GERVASIO GUILLEN a/k/a JORGE ORTIZ-GERMASIO,
Defendant, Appellant.

Before

Breyer and Torruella, Circuit Judges,
and Pettine,* Senior District Judge.

ORDER OF COURT

Entered: August 21, 1985

Page 15, line 5 is modified by inserting the word "clear" between the words "no" and the word "indication".

It is ordered that the petition for rehearing is hereby denied.

By the Court:

Francis P. Scigliano

Clerk.

*Of the District of Rhode Island, sitting by designation.

(cc: Loewy and McCloskey)

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	
vs.	CRIMINAL NO. 82-00018-B
MICHAEL ABELL, et al.,	
Defendants	

RULING ON MOTION FOR MISTRIAL
ON GROUNDS OF JUROR MISCONDUCT

FINDINGS OF FACT

Immediately after the noon recess on the last day of the third week of trial,[1] defense counsel Raul Carreras, Esquire, informed the Court in the presence of the jury, that he had overheard a juror, of whose identity he was not certain (but believed to be regular juror #3), in the presence of several other unidentified jurors waiting for the elevator on their way to lunch, make a statement to the effect that "all of the defendants are guilty anyway."

Other counsel who were in the vicinty of the elevator at the time (and who, along with Mr. Carreras and certain of the defendants, did not wait for the elevator but used the stairs), confirmed that certain jurors were gathered by the elevator. Defendants Oliver and Wendolkowski stated under oath that they had heard the statement and that they believed that one other juror had indicated her agreement with the statement made by the other juror. Defendant Wendolkowski stated that he believed that alternate juror #3 had made the statement, while in the presence of alternate juors #4 and #6, and regular juror #3. Defendant Oliver stated that he believed that alternate juror #3 had made the statement in the presence of alternate #6, regular juror #3 and possibly regular juror #4. Defense counsel (it is not presently clear whether all defendants join) moved for a mistrial on grounds of juror misconduct. The

Court announced that it would inquire of each member of the panel, on the record, separately and under oath, in camera, to determine whether the alleged misconduct occurred; if so, the extent of any prejudice; make findings and determine the appropriate action to be taken. See United States v. Richman, 600 F.2d 286, 295 (1st Cir.1979); United States v. Doe, 513 F.2d 709, 711-12 (1st Cir.1975). The Court then separately inquired of each juror, in the following order: alternate juror #3, alternate #4, alternate #6, regular #3, alternate #1, regular #4, regulars ##5 & 7, alternate #2, regulars ##6 & 12, alternate #5, regulars ## 10, 8, 9, 11, 2 & 1.

Alternate #3 categorically denied having ever made any such statement or any statement about the innocence or guilt of any or all of the defendants on trial. The Court specifically directed her attention to the time and

place of the alleged making of the statement, without indicating the nature or source of either the statement or the allegation. Alternate #3 stated that she had gone to lunch with regular #3 and alternate #4, that they had been joined at lunch by alternates #1 and #6, and that she had waited for the elevator on her way to lunch with alternate #4 and regular #3, and had seen various defense counsel and defendants pass by while she and her companions were waiting for the elevator.

Alternate #4 denied any recollection of any such[2] statement having been made by any juror, confirmed her own presence awaiting the elevator with alternate #3 and regular #3, and that she had seen defendants Oliver and Wendolkowski, and possibly defendant Lopez, pass by the elevator on their way down the stairs. Upon further inquiry, alternate #4

(seat mate of alternate #3) allowed as how alternate #3 "may have said something" after returning to the jury room, while she (alternate #4) was working on a crossword puzzle, to the effect that "most of them were guilty." She said that all of the jurors were present (no other juror recalled hearing any statement of this nature in the jury room) and characterized the statement as "kidding around." She also recalled alternate #1 saying that he was tired and that he "could be bought".

Alternate #6 (who may have been at the elevator at the time of the alleged statement, but recalls (as does alternate #1) arriving at lunch after alternates #3 and #4 and regular #3) ultimately said that he made no such statement and heard none, but that, if he did hear any such statement, "it was said lightly, I don't know." Alternate #6 and alternate #1 have been sharing a room during the trial.

Regular #3 recalls seeing defendant Oliver while she, alternates ##1,3,4 and 6 were waiting for the elevator, but stated that she honestly could not recall whether anything was said about the case while waiting for the elevator. She did recall seeing alternate #3 use a calculator in the jury room to figure up how much money they (the defendants) would have made.

Alternate #1 recalls that he and alternate #6 used the stairs, rather than the elevator, on their way to lunch and that they joined alternates ##3 and 4 and regular #3 at lunch. He admitted, however, that he may have said to alternate #6 (roommate) that he believed most of the defendants were guilty and that he believes that alternate #6 has the same opinion. But alternate #1 states that he has not made up his mind at all as to one of the defendants and believes that he has a fair and impartial mind about the rest and does not

recall discussing his views with any other juror except alternate #6.

Regular #4 went to lunch with her husband, saw alternates ##3 and 4 and regular #3 at lunch, but only to say "hello", and said that she heard and saw nothing else. She allowed as how "we tease a lot amongst ourselves."

Regular #5 recalls having lunch in the jury room with regulars ##2,8,9 & 10, and alternate #5. She neither heard nor made any statements about the innocence or guilt of any defendant. The jurors who had lunch in the jury room were not aware either of the alleged statement or of any other statement as to the innocence or guilt of any defendant.

Regular #7 had lunch with alternate #2, and regulars ##1,6 and 12, at another restaurant. These jurors were not aware of any statement about the innocence or guilt of any

defendant.

Several jurors who had lunch either in the jury room or at another restaurant than that of alternates ##2,3,4 and 6 and regular #3, said that there was some joking, kidding and teasing in the jury room from time to time, but none indicated any joking about the innocence or guilt of any defendant and all expressed their sincere commitment and ability to keep an open mind and not prejudge any defendant.

After inquiring of approximately seven jurors, the Court returned to the courtroom and advised counsel that eleven jurors remained to be interviewed, Counsel voiced various conflicting suggestions as to the further trial schedule. At approximately 6:20 p.m. on Friday (March 9) the Court excused counsel until 8:00 a.m. on Monday, and resumed the individual juror interviews, which were concluded at approximately 7:20 p.m. The Court instructed

each juror individually and privately (on the record) that no mention of the purpose or nature of their interview was to be discussed with any person, most particularly with any other juror. The Court specifically inquired privately of several jurors, as they were called for their interviews, whether any juror had indicated in any way the nature of the reason or purpose of their absence from the jury room. All were emphatic in stating that no such breach had occurred. The foreman, last to be interviewed, confirmed the silence of all jurors on this matter, stated that he had never heard any statement by any juror as to the innocence or guilt of any of the defendants and agreed, at the Court's request, to remind all jurors on <u>each</u> occasion when they assemble and part in the future that they are not to discuss the case or permit any one to discuss the case in their presence until

specifically authorized by the Court to do so upon retiring for their deliberations. The Court instructed the foreman to notify the Court at once if any juror violated the Court's instructions.

The Court then brought the jury into the courtroom and instructed them once again as a group concerning their obligations to keep an open mind, avoid any outside influence and refrain from discussing the case in any way with any person, including their fellow jurors.

CONCLUSIONS OF LAW

1. The alleged juror misconduct occurred substantially as alleged.

2. The juror misconduct evidences a clear disregard by alternate juror #3, and, possibly, regular juror #3 and alternate juror #4, of the Court's repeated instructions to refrain from such conduct.

3. Alternate jurors #1 and #6 likewise have disregarded the Court's instructions, in separate and unrelated instances, and perhaps were exposed to the alleged statement as well.

4. As to regular jurors ##1,2,4,5,6,7, 8,9,10,11 and 12 and alternates ##2 and 5: there is no indication that these jurors were exposed, either directly or indirectly, to the particular juror misconduct here alleged, or to the communications between alternate jurors ##1 and 6; there is no indication of any juror misconduct on the part of any of these jurors; there is no indication that anything was said by or within the hearing of any defendant; there are indications of kidding, joking or lighthearted statements in the presence of some of these jurors, but no indication that any of these jurors has been prejudiced or biased thereby or that any of these jurors is or has been either unable or unwilling to keep an open mind and act

fairly and impartially as to each defendant.

5. The instances of juror misconduct involving alternates ##1,3,4 and 6 and, possibly, regular #3 cannot be found to have been "clearly unprejudicial," see Richman at 295; and, although the misconduct appears not to have been motivated by animus toward any defendant and may not indicate inability on the part of alternates #4 and 6 and regular #3 to render a fair verdict, the appearance of fairness must be considered as well; and there is a definite appearance of unfairness.

6. The alleged juror misconduct has not reached, tainted or affected regular jurors ##1,2,4,5,6,7,8,9,10,11 and 12 and alternate jurors ##2 and 5 in any way; nor is there any other indication that any of these jurors is other than willing and able, indeed determined, to maintain an open,

unbiased, impartial and fair mind in determining the innocence or guilt of each and every defendant.

7. There is neither any need nor would it serve the interests of justice to pursue further inquiry of these jurors concerning this matter in open court. Any such open court inquiry would risk exposing untainted jurors to the alleged juror misconduct and alert them to the source of the information upon which the inquiry by the Court was predicated.

Accordingly, the Court directs that regular juror #3, and alternate jurors ##1,3, 4 and 6 be excused from further service in this case for the reasons stated above.

The motions for mistrial are DENIED.

SO ORDERED.

Dated at Bangor, Maine this 12th day of March, 1984.

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Chief Judge

1/Just prior to excusin the jury for the noon recess, following the closing argument by Government counsel and before any defense counsel had presented final argument, the Court pointedly instructed the jury not to discuss the case among themselves, but to await the completion of all argument and the Court's instructions on the law.

2/The Court did not disclose to any juror the nature of the alleged statement, but inquired about any statement by any juror about the innocence or guilt of any defendant. The Court did not indicate to any juror the source of the information upon which the inquiry was predicated.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	
vs.	CRIMINAL NO. 82-00018-B
MICHAEL ABELL, et al.,	
Defendants	

MEMORANDUM SUPPLEMENTING
FINDINGS ON MOTIONS FOR MISTRIAL

The Court is concerned that the argument of counsel in support of their motion for mistrial may have confused the record as to the nature of the Court's factual findings. The Court, indeed, found that the alleged juror misconduct occurred at the elevator during the Friday noon recess. The Court related at page 3 of its opinion that during individual voir dire alternate #4 denied hearing that or any other such state-

ment, but upon closer inquiry she allowed that such a statement was made later in the jury room.

By combining the admission of alternate #4 and the Court's first numbered finding, Mr. Goltzer seems to conclude that alternate #3 twice made the alleged statement, once at the elevator and again in the jury room after lunch. That is not the intended import of the Court's findings, nor is it the Court's view of the facts.

The Court finds that alternate #4, having once denied any imprudent statement by alternate #3 and having specifically denied the elevator incident, found it impossible to admit to having heard the statement made at the elevator. The Court concluded that alternate #4 then stated to the Court that the incident had occurred in the jury room because she was unable to admit that she just previously had made a direct misrepresentation to the Court.

The Court is satisfied that the alleged statement was made at the elevator by alternate #3 and that it was heard by alternate juror #4 and by no other juror. The Court finds that alternate #3 misrepresented to the Court and that alternate #4 did so at first, but later attempted, however clumsily, to recant.

The Court, unlike counsel, has met with each juror individually and unequivocally rejects counsel's invitation to assume that all other jurors lied to the Court. Rather, as previously stated, the Court was struck by the candor, good faith and seriousness of most of the panel, including all of the jurors who have not been excused.

The Court has carefully considered and rejects the view of defense counsel that the Court acted imprudently in following the procedures outlined by the Richman court.

Nothing in the Richman opinion suggests that the approach taken by the Court in this case was inappropriate under the circumstances of this case. Rather, the Richman opinion suggests that the approach outlined there generally should be followed. United States v. Richman, 600 F.2d 286, 295 (1st Cir.1979). See also United States v. Kelly, 722 F.2d 873, 881 (1st Cir.1983). This Court, having undertaken such a procedure, would add only that it believes that Richman outlines an adequately careful and thorough inquiry by the Court into the type of juror misconduct involved in this case. Far from compounding any potential prejudice, the Court is satisfied that its efforts have prevented the spread of any taint from the juror misconduct in this case, have eliminated the possibility of any prejudice, and have served to reinforce in the minds of the remaining jurors the solemn importance of

of their roles and of their oaths.

Finally, the Court wants to leave no doubt that it is fully satisfied that is has removed from this panel any prejudicial exposure to the asserted malignancy of this juror misconduct. Indeed, in the Court's view, and to carry forward the malignancy analogy, the Court is fully satisfied that is has removed any malignancy, all of the benign growth and, quite probably, some healthy tissue as well.

Dated at Bangor, Maine this 12th day of March, 1984.

_____

Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE NO. 84-1452

UNITED STATES OF AMERICA, :

Plaintiff/Appellee, :

vs. :

GERVASIO GUILLEN, :

Defendant/Appellant. :

PETITION FOR REHEARING

Defendant/Appellant, GERVASIO GUILLEN ("GUILLEN"), by and through his undersigned counsel, and pursuant to the provisions of Rule 40 F.R.A.P., hereby submits this Petition for Rehearing of the decision this Court entered June 20, 1985,[1/] and in support of this Petition would state the following:

JUROR MISCONDUCT

During the course of the trial court's *in camera* inquiry into allegations of juror

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1/ This Court granted GUILLEN'S motion to enlarge the time for filing a petition for rehearing to July 19, 1985.

misconduct, the court became aware that regular juror no. 3 had seen alternate juror no. 3 using a calculator, apparently to determine how much money the Defendants might have made from their drug transactions. The court dismissed both jurors, but did not ask the other jurors about the incident. In rejecting the Appellant's contention that the trial court erred by failing to conduct a further inquiry into this incident, this Court held as follows:

> Further, the court had no indication that any other jurors had seen the incident. No one else mentioned it. All of the others specifically denied they had heard any improper discussions in the jury room. And all the others swore they could remain open minded. The trial court might reasonably have concluded that to question these other jurors more specifically about the incident -- in the absence of good reason to believe they had witnessed it -- might, by drawing their attention to it, "do more harm than good." Id. at 401.

This Court has clearly overlooked the in camera testimony of juror Debbie Kohler (regular juror no. 3), which was quoted in the brief filed on behalf of Defendant/ Appellant Walter Wendolkowski, as follows:

> Q: Is there anything else you can recall concerning any statements that you made or any statements that any of your fellow jurors made on the way to lunch, at lunch, returning from lunch or while you have been in the jury room since then?
>
> A: I think one of us was figuring out how much money they would have made on a calculator.
>
> Q: Do you remember who?
>
> A: Do you really want me to tell you that?
>
> Q: Yes.
>
> A: Reva. But I think it was more or less just taking the figures and trying to see how much would have been made and what the --
>
> Q: Who else was in her immediate presence when that was done?
>
> A: Gosh. We've all been sitting together.

A: Yeah.

Q: That was after lunch today?

A: (nodding head in the affirmative)

(T.2271-2272).

Contrary to this Court's conclusion, the juror's statement that the calculator incident occurred in the immediate presence of all of the jurors, who were sitting together in the small jury room after returning from lunch, gave ample indication to the trial court that other jurors had seen the incident. Moreover, when this testimony by juror Debbie Kohler is compared with the testimony of alternate juror no. 4, Brenda Dickey, that alternate juror no. 3 said something in the jury room, after the jurors had returned from lunch (T.2253), the trial judge should have been alert to the possibility that other jurors had overheard and seen the calculator incident in the jury room and the court should have conducted a more thorough inquiry into this incident.

In light of the fact that none of the other jurors who, according to juror Debbie Kohler, were present in the small jury room at the time that alternate juror no. 3 was using the calculator were asked about this incident, this Court's conclusion that the trial judge had no indication that any other jurors had seen the incident because no one else mentioned it is a non sequitur. Furthermore, what possible harm could have occurred had the court discreetly inquired of the other jurors whether or not they had observed alternate juror no. 3 using a calculator? Either the incident occurred or it didn't. Either the other jurors saw it or they didn't. In holding that "the trial court might reasonably have concluded that to question these other jurors more specifically about the incident -- in the absence of good reason to believe they had witnessed it -- might, by drawing their attention to it, 'do more harm than good,'" equates the Court's lack of

knowledge concerning the incident with lack of prejudice to the Defendants.

This Court has overlooked the fact that the particular misconduct involved -- an alternate juror bringing a calculator into the jury room prior to the close of the case and her utilizing this calculator in the presence of those who would ultimately be responsible for determining the guilt of innocence of the Defendants -- was extrinsic in nature and, in fact, more serious than the misconduct which the Court initially set out to explore. See, e.g., United States v. Chiantese, 582 F.2d 974 (5th Cir.1978)(a presumption of prejudice arises when an outside influence on the jury is brought to the attention of the trial court). This Court's decisions in United States v. Richman, 600 F.2d 286 (1st Cir.1979) and United States v. Doe, 513 F.2d 709 (1st Cir. 1975), required that the trial court conduct a full investigation to ascertain whether the

alleged jury misconduct actually occurred, and that simply was not done in this case. Accordingly, a new trial is required.

(Irrelevant text omitted)

CERTIFICATE OF SERVICE

It is hereby certified that 3 true copies of the foregoing Petition for Writ of Certiorari were mailed to those listed below, postage prepaid, on the 19 day of October, 1985.

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